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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHARLES WILLIAMS, Defendant and Appellant.	B148194 (Super. Ct. No. BA192697)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

Anthony Boskovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Kenneth N. Sokoler, Deputy Attorney General, for Plaintiff and Respondent.

Charles Williams appeals from the judgment entered after a jury convicted him of assault with a firearm (Pen. Code, § 245, subd. (a)(2)) and of being a felon in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) For the reasons set forth below, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY[1]

At around 6 p.m. on September 21, 1999, Gregory Zuniga became involved in a dispute with defendant and appellant Charles Williams (appellant) over a parking spot at the apartment complex where Zuniga lived. The dispute became physical and escalated to the point where appellant pointed a gun at Zuniga and threatened to kill him. Zuniga moved his car to another spot, returned to his apartment and phoned the police. Police officers who searched the apartment complex found appellant inside one of the units, where appellant's friend and the friend's grandmother lived. A search of that unit turned up a loaded .25 caliber semiautomatic pistol inside a dresser drawer and a shirt and hat worn by appellant during the incident.

Appellant was charged by information with two counts: (1) assault with a firearm (Pen. Code, § 245, subd. (a)(2)); and (2) being a felon in possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) The information also alleged that appellant had: three prior convictions for purposes of the Three Strikes law (Pen. Code, §§ 667, subds. (b) - (i), 1170.12, subds. (a) - (d)); four prior prison terms for purposes of the sentence enhancement provided by Penal Code section 667.5, subdivision (b); and four prior felony convictions that made him ineligible for probation. (Pen. Code, § 1203, subd. (e)(4).) Appellant was convicted of both counts. In a bifurcated proceeding, the prior conviction allegations were all found true. The court imposed a sentence of 25

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[1] Because the facts underlying the convictions are not at issue, we state them in brief. In accord with the usual rules on appeal, we state those facts in the manner most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

years to life on counts 1 and 2, but stayed the count 2 sentence under Penal Code section 654. The prior prison terms were stricken. (Pen. Code, § 667.5, subd. (b).)

On appeal, appellant contends that the court erred by denying his pre-trial *Pitchess*[2] motion seeking discovery of the personnel records of six police officers. He also contends the court erred by instructing the jury with CALJIC No. 17.41.1.

DISCUSSION

1. The *Pitchess* Motion

Pitchess established a criminal defendant's limited right to discover peace officer personnel records. The *Pitchess* holding was later codified by Penal Code sections 832.7 and 832.8, which designate such records as confidential, and Evidence Code sections 1043 and 1045, which set forth the procedures and standards for obtaining discovery of those records. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019 (*California Highway Patrol*).)

The Evidence Code sections establish a two-step procedure.[3] Under section 1043, the defendant must file a motion which describes the type of records or information sought. (§ 1043, subd. (b)(2).) The request must be supported by "[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such governmental agency identified has the records or information from the records." (§ 1043, subd. (b)(3).) There is no requirement that the affiant have personal knowledge of the matters stated in the declaration, which may be based merely on information and belief. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 86 (*Santa Cruz*). A declaration by the defendant's lawyer is sufficient.

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[3] All further section references are to the Evidence Code.

(*People v. Memro* (1985) 38 Cal.3d 658, 676.) If the defendant makes a sufficient showing, section 1045 provides for an in-camera review of the documents, where the trial court determines whether they have any relevance to the issues raised in the current proceedings. (§ 1045; *California Highway Patrol, supra,* 84 Cal.App.4th at p. 1020.) We review the trial court's ruling for an abuse of discretion. (*Id.* at p. 1019.)

The good cause requirement of section 1043 means the defendant must demonstrate the relevance of the requested material by providing a "specific factual scenario" which establishes a "plausible factual foundation" for the allegations of officer misconduct. (*California Highway Patrol, supra,* 84 Cal.App.4th at p. 1020, citing *Santa Cruz, supra,* 49 Cal.3d at pp. 85-86.) The *Santa Cruz* court held that a sufficient showing of good cause had been made where the defense counsel's declaration put forth a specific factual scenario—the use of excessive force by arresting officers—supported by a plausible factual foundation—the police reports clearly showed considerable force was used. On that showing, the defendant was entitled to discover any prior complaints against the arresting officers for excessive force or violence in an effort to establish his claim of self defense to battery on a police officer. (*Santa Cruz, supra,* 49 Cal.3d at p. 93; see *California Highway Patrol, supra,* 84 Cal.App.4th at p. 1020.)

Appellant's *Pitchess* motion sought discovery of information in the personnel files of six named police officers which concerned citizen complaints relating to "official misconduct amounting to moral turpitude, including but not limited to allegations of false arrest, planting evidence, fabrication of police reports, fabrication of probable cause, false testimony, perjury, [and] the use of excessive force . . . ." The evidentiary basis for the motion came from the declaration of appellant's lawyer, who stated the defense would "involve claims that the officers lied and fabricated evidence." According to the declaration, appellant "denies possessing a weapon. [Appellant] denies leaving a weapon at the location where the weapon was found, and the owner of the property where the gun was allegedly recovered denies the presence of any weapon

in the residence prior to the arrival of the police. [Appellant] indicates officers told him that they were going to put a gun on him before they left the location."

Appellant analogizes this showing to that in *People v. Gill* (1997) 60 Cal.App.4th 743 (*Gill*), where the appellate court held the trial court erred in finding there was no good cause to conduct an in-camera review under *Pitchess*. The defendant in *Gill* was arrested for cocaine possession and claimed the arresting officer planted the drugs on him. His lawyer's *Pitchess* declaration said the defense would show that the drugs were placed on defendant by that officer to cover up the officer's use of excessive force, adding that the officer had a pattern of fabricating probable cause in drug cases. The appellate court held this satisfied the *Pitchess* good cause requirement. (*Gill, supra,* 60 Cal.App.4th at p. 750.)

Gill is not analogous. The defendant in *Gill* sought discovery as to the one specific officer who found the cocaine and arrested defendant. Appellant here sought discovery as to six different officers, but his lawyer's declaration offered no information as to what role, if any, those officers played in searching the apartment and arresting appellant.[4] Because discovery is permitted as to only those officers involved in the incident (§ 1047; *Alt v. Superior Court* (1999) 74 Cal.App.4th 950, 957), we hold that appellant failed to show good cause for discovery as to any of the six officers identified in his motion. (*People v. Memro, supra,* 38 Cal.3d at pp. 685-687 [defendant contended his confession was coerced by interrogating officers; no foundation to show that noninterrogating officers were somehow linked to interrogating officers].)

The declaration also failed to put forth a specific factual scenario that established a plausible factual foundation of officer misconduct. In *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135 (*San Jose*), the court reversed a trial court order granting the defendant's *Pitchess* motion because the motion did not show good cause

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[4] The same is true of the preliminary hearing transcript, which the trial court said it considered when denying the *Pitchess* motion. Nowhere in the transcript are the names or actions of any police officers discussed.

for granting the request. Defense counsel filed a declaration stating that "knowing and voluntary consent to enter was not in fact obtained by the officers . . . ." The appellate court held this was insufficient because it "did not specify whether the officers coerced [defendant's girlfriend] into consenting (and if so, what means of coercion the police employed), or whether the officers simply failed to obtain [the girlfriend's] consent. The police report sheds no further light on this issue. The only relevant statements in the police report were '[the girlfriend] gave us permission to look around the house for the suspect' and '[the girlfriend] gave us permission to look around the house for anything that might indicate [defendant's] whereabouts.' " (*San Jose, supra,* 67 Cal.App.4th at p. 1147.) That was not a specific factual scenario, the court held. (*Ibid.*) The same was true of statements in the declaration that material misrepresentations were made in the police report or court testimony and that the officers mishandled certain evidence. Instead of offering a specific factual scenario, the declaration failed to specify any particular misleading statements or mishandled evidence, or how any such evidence had been mishandled. (*Ibid.*)

Appellant's supporting declaration here suffered from much the same defects. According to the declaration, appellant did not possess a gun and did not leave one at the location where the gun was found. Appellant then "indicates" that unnamed officers told him they would "put a gun on him . . . ." While the declaration implies that the gun was planted by the officers, it never directly says so. None of the circumstances surrounding the search of the apartment or the discovery of the gun are provided. In short, nothing in the declaration provides a specific factual scenario to show that a gun was in fact planted by anyone, much less any of the named police officers. The same is true of the preliminary hearing testimony cited by defendant. That testimony came from Zuniga and a defense eyewitness, who differed as to whether appellant used a gun during the altercation with Zuniga. Finally, to the extent appellant's motion was based on allegations of excessive force, it was properly denied because he failed to include a

copy of the police report with the motion. (§ 1046.) We therefore hold no error occurred in denying appellant's *Pitchess* motion.

2. CALJIC No. 17.41.1

The trial court instructed the jury with CALJIC No. 17.41.1, as follows: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Appellant contends this instruction is constitutionally infirm because it: infringes upon the right of jury nullification; leads to coercion of holdout jurors, thus violating a defendant's right to a unanimous verdict by an impartial jury; and interferes with a defendant's right to have a jury which deliberates freely and frankly.[5]

Appellant contends this instructional error was a structural defect that is reversible per se. Assuming for discussion's sake only that the instruction was improper, reversal is not automatically required, however. (*People* v. *Molina* (2000) 82 Cal.App.4th 1329, 1332-1335 (*Molina*) [reversal not required if error was harmless beyond a reasonable doubt].) We choose to follow *Molina*. Appellant does not contend, and the record does not suggest, that the instruction had any effect on the outcome. The record shows the jury deliberated less than 12 hours over three days before reaching its verdict. Nothing in the record shows any holdout jurors or any reports to the court about jurors who refused to follow the court's instructions.

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[5] The propriety of this instruction is currently under review by the California Supreme Court in *People* v. *Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000, *People v. Taylor* (2000) 80 Cal.App.4th 804, review granted August 23, 2000 (No. S088909), and *People v. Morgan* (2000) 85 Cal.App.4th 34, review granted March 14, 2001.

Although the jury reported a deadlock on count 1, that "deadlock" lasted just two minutes once the jury resumed deliberations. On this record, we hold that any error caused by giving CALJIC No. 17.41.1 was harmless beyond a reasonable doubt. (*Molina, supra,* 82 Cal.App.4th at pp. 1335-1336.)

DISPOSITION

For the reasons set forth above, the judgment is affirmed.

NOT FOR PUBLICATION.

RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.